91-1494

(1)

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

FRANK O. GUNTER, et al.,

Petitioners,

vs.

SHAKUR ABDULLAH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is it a proper exercise of the supervisory authority of a Court of Appeals for such court to order the appointment of counsel for indigent inmates in all actions brought under 42 U.S.C. § 1983 which involve jury trials, First Amendment issues, or analysis under *Turner v. Safley*, 482 U.S. 78 (1987)?

2. Should the Supreme Court exercise its supervisory authority to resolve a pronounced divergence in policy among the circuits regarding appointment of counsel for indigent civil rights plaintiffs?

PARTIES TO THIS ACTION

The parties to the proceeding are the petitioners, Frank O. Gunter, Gary E. Grammer, Harold W. Clarke, John P. Shaw, and Mark W. Rosenau, and the respondent, Shakur Abdullah.

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No. _____

In The

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FRANK O. GUNTER, et al.,[1]

Petitioners,

vs.

SHAKUR ABDULLAH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 949 F.2d 1032 (1991) and is attached hereto as Appendix B. The opinion of the

[1] The other petitioners in this case in the United States Court of Appeals for the Eighth Circuit were Gary E. Grammer, Harold W. Clarke, John P. Shaw, and Mark W. Rosenau.

United States District Court for the District of Nebraska is not reported, but the court's final decision, denying Abdullah's motion for new trial, is attached as Exhibit C. The district court's judgment in accordance with jury verdict is attached as Exhibit D.

JURISDICTION

The judgment of the Eighth Circuit partially affirming and partially reversing the decision of the United States District Court for the District of Nebraska was entered on November 26, 1991. A timely Motion for Rehearing and Suggestion for Rehearing *En Banc* was filed. The order of the Eighth Circuit denying the Motion for Rehearing and Suggestion for Rehearing *En Banc* was entered on January 31, 1992, and is attached hereto as Appendix A. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution states, in pertinent part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .

2. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

3. 42 U.S.C. § 1988 provides:

> . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

4. 28 U.S.C. § 1915(d) provides that:

> The court may request an attorney to represent any such person [proceeding *in forma pauperis*] unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

STATEMENT OF THE CASE

Shakur Abdullah, an inmate at the Nebraska State Penitentiary, filed this action *pro se* in the federal district court on October 12, 1988, challenging a policy which prevented him from withdrawing two dollars from his inmate account to send to a Muslim Masjid. He demanded a jury trial.

Although Abdullah also requested appointment of counsel, that request was denied by U.S. Magistrate

Judge David L. Piester in his Report, Recommendation and Order of October 20, 1988 (App. 25-26):

> The Eighth Circuit Court of Appeals has held that counsel should be appointed, upon request, for an indigent civil rights plaintiff if the plaintiff has met his burden of demonstrating that his complaint is not frivolous, depending upon the court's assessment of the need for counsel, including consideration of such factors as the factual complexity of the case, the ability of the plaintiff to investigate the facts, the existence of conflicting testimony, the plaintiff's ability to present his claims and the complexity of the legal issues. *In re Lane*, 801 F.2d 1040, 1043-44 (8th Cir. 1986); *Johnson v. Williams*, 788 F.2d 1319, 1322-23 (8th Cir. 1986). Applying these considerations, I shall deny the plaintiffs' request for appointment of counsel in this matter.

Abdullah objected to the magistrate's Order, but U.S. District Court Judge Warren K. Urbom upheld the magistrate's decision on November 14, 1988 (App. 20):

> I agree with the magistrate that the factual and legal problems do not appear to be sufficiently complicated to require appointment of counsel.

Abdullah – a veteran litigator – conducted extensive discovery and continued to demand a jury trial, although the defendant prison administrators offered to waive a jury.

A trial by jury was conducted on November 28 through November 30 of 1989, and the jury rendered its verdict for the defendants. Judgment was entered for the

defendants on December 5, 1989 (App. 19). Abdullah's motion for new trial was denied on December 22, 1989 (App. 17-18).

Abdullah appealed to the U.S. Court of Appeals for the Eighth Circuit, alleging, among other matters, that the district court abused its discretion by failing to appoint him counsel. The Court of Appeals appointed counsel for Abdullah on the appeal, and supplementary briefs were submitted.

On November 26, 1991, the Court of Appeals issued its opinion, finding that Judge Urbom had abused his discretion by not appointing counsel for Abdullah, because the case involved a First Amendment issue, an analysis under *Turner v. Safley*, 482 U.S. 78 (1987), and a jury trial. The opinion was written by Judge McMillian. Judges Arnold and Loken joined. (App. 2-16).

The appellee prison administrators moved for rehearing *en banc* on December 6, 1991. That request was denied by the Court of Appeals on January 31, 1992, although Judges Beam, Fagg, and Bowman would have granted the request. (App. 1).

REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS ABUSED ITS SUPERVISORY AUTHORITY BY ORDERING THE APPOINTMENT OF COUNSEL FOR THE PLAINTIFF (RESPONDENT) IN DISTRICT COURT.

Although Abdullah's First Amendment Free Exercise Claim was not patently frivolous, it was neither factually nor legally complex.

Magistrate Judge Piester and Judge Urbom were in the best position to determine whether or not Abdullah was capable of representing himself, conducting any necessary discovery, and presenting the facts and legal arguments to the jury and the court. Magistrate Judge Piester and Judge Urbom found that Abdullah was fully capable of representing himself. The record of the case shows that Abdullah was a competent advocate on his own behalf. Magistrate Judge Piester and Judge Urbom considered *each* factor required by the U.S. Court of Appeals for the Eighth Circuit to be given consideration under *Johnson v. Williams*, 788 F.2d 1319, 1322-23 (1986), and simply concluded that the court-appointment of counsel for Abdullah was *not* warranted.

Although the case was tried before a jury at Abdullah's request, Judge Urbom (a highly-experienced jurist) presided over the trial and was in a position to grant a new trial, or a judgment notwithstanding the verdict, if the jury had returned a verdict inconsistent with the facts of the case or the law.

The verdict returned by the jury was not inconsistent with the facts or the law, and Judge Urbom did not abuse

his discretion by declining to appoint counsel for Abdullah.

B. THE SUPREME COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO MODIFY THE EIGHTH CIRCUIT'S PRACTICE OF MANDATING THE APPOINTMENT OF COUNSEL FOR INDIGENT INMATE CIVIL RIGHTS PLAINTIFFS.

Ostensibly, the standard applied in the Eighth Circuit to determine whether or not an indigent inmate should be appointed counsel in a civil rights action is that standard described in *Johnson, supra,* 788 F.2d at 1322-23:

> Although factual complexity is certainly a relevant factor for a district court to consider in determining an indigent litigant's need for appointment of counsel, it is not the only factor. . . . We believe that in addition to factual complexity, the district court should also consider the ability of an indigent to investigate the facts, . . . the existence of conflicting testimony, . . . the ability of an indigent to present his claim, . . . and the complexity of the legal issues. [Citations omitted].

The above standard is not objectionable. The application of the standard by the Court of Appeals *is* objectionable and is an inappropriate use of the court's supervisory authority.

The *Johnson* decision was written by Judge McMillian, as was the Court of Appeals' decision in this case. *Johnson* involved an Arkansas inmate who contended that his placement in a "quiet cell" for eighteen hours on two occasions, without clothing or bedding,

constituted a violation of his Eighth Amendment rights. The Court of Appeals found that the district court had abused its discretion by not appointing counsel for inmate Johnson, because the facts and law were "complex" and because Johnson behaved in a contemptuous manner at trial. So, Johnson was rewarded with the appointment of counsel.

In the case at bar, the Court of Appeals found that Abdullah's desire to send two dollars to a Muslim organization presented "complex" facts and law, and that Abdullah's demand for a jury was further grounds for appointment of counsel on his behalf.

The objective criteria listed by the Court of Appeals in *Johnson* have been distorted by that court to envelop any inmate civil rights case which is not patently "frivolous or malicious."

Most revealing of the Eighth Circuit's practice is its decision in *Williams v. White*, 897 F.2d 942 (8th Cir. 1990), in which it failed to give even lip-service to the *Johnson* criteria. Instead, the Court of Appeals ordered the district court to appoint counsel for the inmate plaintiff simply because the plaintiff's case was not patently frivolous and subject to immediate dismissal.

(1) The practice is inconsistent with the standards applied in other circuits.

Other U.S. Courts of Appeals have recognized that appointment of counsel in civil cases is not a constitutional right. As was noted in *Fowler v. Jones*, 899 F.2d 1088 (11th Cir. 1990), the appointment of counsel in a civil case

"is a privilege that is justified only by exceptional circumstances, where the facts and legal issues are so novel and complex as to require the assistance of a trained practitioner." *Id.* at 1096.

The same "exceptional circumstances" standard is applied in the Fifth Circuit, with specific deference to the judicial discretion of the district court judge. *Ulmer v. Chancellor,* 691 F.2d 209, 213 (5th Cir. 1982). The U.S. Courts of Appeals for the Eleventh and Fifth Circuits have also noted that the quality of a plaintiff's written pleadings, the plaintiff's conduct at trial, and a plaintiff's own statements about his experience in assisting other inmates in legal matters may be considered by the district court when determining whether or not the plaintiff requires the assistance of counsel. *Fowler, supra,* at 1096; *Archie v. Christian,* 812 F.2d 250, 253 (5th Cir. 1987).

The Seventh Circuit has undergone an interesting evolution in its handling of the issue. In *McKeever v. Israel,* 689 F.2d 1315 (7th Cir. 1982), that court found that a district court had abused its discretion by failing to consider appointment of counsel for an indigent inmate plaintiff in a civil rights action. The Court of Appeals responded by mandating appointment of counsel. In a thorough and persuasive dissenting opinion, Judge Posner noted that the Court had overreacted and usurped the discretion of the district court. Instead, as Judge Posner suggested, the matter should have been remanded for the district court to exercise its discretion under appropriate guidelines:

> I believe there should be a presumption against appointing counsel in a prisoner's civil rights

> suit. . . . I am concerned that the panel's decision . . . may be interpreted by the district courts of this circuit as another step on the road toward making appointment of counsel in civil rights cases routine. That is a destination I should not like to reach. There are not enough lawyers in America to satisfy prisoners' demands for counsel; those demands are insatiable.

Id. at 1315.

More recently, Judge Posner wrote for the majority in *Hughes v. Joliet Correctional Center*, 931 F.2d 425 (7th Cir. 1991). The district court judge in *Hughes* had declined to appoint an attorney for the inmate civil rights plaintiff at the time of the defendants' submission of a motion for summary judgment, because the judge had a policy of denying such requests until and unless she determined that an evidentiary hearing was needed. Judge Posner stated:

> [O]ur quarrel with the judge is that she should have considered Hughes's request in light of the particulars of his case rather than simply deny the request in accordance with a general policy.

Id. at 430.

The case was remanded for the district court judge to exercise her discretion in accordance with the appellate court's guidelines – just as Judge Posner would have done in the earlier *McKeever* decision.

It is only in the Eighth Circuit that the nightmare scenario vividly described by Judge Posner in the *McKeever* dissent has come true. In the Eighth Circuit there is a presumption that counsel must be appointed for indigent civil rights plaintiffs whose pleadings are not

patently frivolous, and the Court of Appeals does not defer to the district courts to exercise their sound judgment upon consideration of specific criteria. In the Eighth Circuit, the Court of Appeals mandates the appointment of counsel for indigent inmates in civil rights actions which survive a *sua sponte* dismissal, and gives no deference to the judgment or discretion of the district courts. *Williams, supra.*

(2) The practice lacks due deference for the discretion of district court judges.

Considerable deference should be given to a district court judge's determination of whether or not a particular plaintiff is capable of proceeding *pro se.* District court judges and magistrate judges are in the best position to evaluate a plaintiff's skill and intelligence, and to know the nature and extent of the law library facilities, legal aide assistance, and other resources available to an inmate within a state's correctional system.

Some judges on the U.S. Court of Appeals for the Eighth Circuit have articulated a policy of giving deference to district court judges' decisions to grant or deny counsel for indigent civil rights plaintiffs. As was stated in *In re Lane,* 801 F.2d 1040 (8th Cir. 1986):

> The decision to appoint counsel in civil cases is committed to the sound discretion of the district court. . . . .
>
> We are aware that several of our earlier opinions appear to be in some conflict on this issue.
>
> . . .

> We think some confusion may have developed from our later citations of *Redfield*. . . . However, we do not believe that these *per curiam* opinions relying upon *Redfield* do more than simply express in abbreviated fashion the requirement enunciated in *Redfield* that once a *prima facie* claim has been alleged "further inquiry should be made as to need."

Id. at 1043, citing *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984).

Unfortunately, the policy of deference for the judgment of district court judges articulated in *Lane* does not reflect the actual practice of the Court of Appeals or the position of most judges serving on that court. The apparent "conflict" and "confusion" acknowledged by the Court of Appeals in *Lane* still exists within the Eighth Circuit and needs to be resolved by the Supreme Court's exercise of its supervisory authority.

(3) The practice places an unreasonable burden on members of the bar.

In *Mallard v. United States District Court for Southern District of Iowa*, 490 U.S. 296 (1989), the Supreme Court held that attorneys could not be compelled to represent indigent litigants in civil cases under 28 U.S.C. § 1915(d). It is not surprising that the case originated within the Eighth Circuit and involved inmates suing prison officials under 42 U.S.C. § 1983.

Although the district courts and courts of appeals are now precluded from conscripting attorneys to represent

inmate civil rights litigants, the Eighth Circuit continues to mandate that the district courts appoint attorneys for such litigants in cases which are not patently frivolous. District court judges are expected to refer to a "sufficient list of . . . competent attorneys who will serve in *pro bono* situations such as the case presented." *Redfield, supra,* at 1005. As a practical matter, there is no such "sufficient list" of attorneys willing to handle the large volume of inmate civil rights litigation. District court judges or magistrates must use all their powers of persuasion to cajole an attorney to accept such a burden. The process is time-consuming for the district courts, and onerous for attorneys who accept such assignments. As Judge Posner stated in the *McKeever, supra,* dissent:

> If it is a meritorious claim there will be money in it for a lawyer; if it is not it ought not to be forced on some hapless unpaid lawyer. In contrast, the appointment of counsel is a source of endless conflict between prisoners and lawyers. The following pattern has become commonplace: after reviewing the case, the lawyer who has been appointed to represent the prisoner advises the court that the case has no merit, and asks leave to withdraw; and the prisoner then accuses that lawyer (who after all was not his personal choice) of incompetence and bad faith and requests the appointment of another. The cycle begins again, and very often the prisoner ends up proceeding *pro se*.

Id. at 1325.

(4) The practice unfairly penalizes defendants.

How can the district courts within the Eighth Circuit comply with the mandate of the Court of Appeals to appoint attorneys for indigent inmate civil rights litigants in non-frivolous cases, when the attorneys can reject such appointments following *Mallard, supra?*

First, if an inmate plaintiff prevails on any one of a large number of issues, no matter how insignificant the issue or minor the success, the plaintiff's court-appointed attorney is awarded attorney's fees for work directly or indirectly related to that issue. *Brown v. Bathke,* 588 F.2d 634, 637 n.5 (8th Cir. 1978).

Second, the attorneys' fees are enhanced by the court in an effort to attract competent counsel to handle similar cases in the future. In *Graham v. Otoe County,* CV89-L-234, slip op. at 2 (D. Neb. Dec. 11, 1990), Magistrate Judge Piester explained why he enhanced attorneys' fees by thirty (30) percent for court-appointed counsel in an inmate civil rights action, awarding $14,389.70 in attorneys' fees in a case where the inmate received an award of $150.00:

> This court has had extreme difficulty finding competent counsel willing to represent prisoners in civil rights cases, and it is appropriate to take this factor into consideration in order to bring the fee within the range that would attract competent counsel.

(App. 31-32).

The defendants in inmate civil rights actions, who may have prevailed on the vast majority of issues raised

in the litigation, are personally liable not only for the damages, but also for the enhanced attorneys' fees awarded to the inmate's counsel. Correctional administrators, who may be sued by inmates hundreds of times in a career, suffer the final impact of the court's desire to provide an incentive for attorneys to represent inmates in civil rights litigation.

(5) The practice is contrary to the intent of Congress, expressed through 28 U.S.C. § 1915(d) and 42 U.S.C. § 1988.

Congress enacted 28 U.S.C. § 1915(d) to give courts the discretion to request counsel to represent an individual proceeding *in forma pauperis* in a civil action. The statute reads:

> The court *may request* an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious. [Emphasis added].

Before the Supreme Court's decision in *Mallard, supra,* the U.S. Court of Appeals for the Eighth Circuit construed the statute to read as follows:

> The court *must require* an attorney to represent any such person unable to employ counsel *unless* the allegation of poverty is untrue or the action is frivolous or malicious.

Following *Mallard,* the U.S. Court of Appeals for the Eighth Circuit now construes the statute as follows:

> The court *must* request an attorney to represent any such person unable to employ counsel, and

> *must continue making such requests until counsel is found, unless* the allegation of poverty is untrue, or the action is frivolous or malicious.

The Court of Appeals' interpretation of 28 U.S.C. § 1915(d) is unwarranted and contrary to the intent of Congress.

Congress enacted 42 U.S.C. § 1988 to provide an incentive for attorneys to handle plaintiffs' civil rights actions voluntarily. As Judge Posner said in the *McKeever, supra,* dissent:

> Where damages are sought, the prisoner should have no difficulty finding a lawyer willing to take his case on a contingent-fee basis, provided the case has some merit. Even if only injunctive relief is sought, he should be able to retain counsel to assist him with a claim having substantial merit, because 42 U.S.C. § 1988 allows the court to award the winning party in a civil rights case a reasonable attorney's fee, and the award is made as a matter of course when the plaintiff is the winner. . . .
>
> Encouraging the use of retained counsel thus provides a market test of the merits of the prisoner's claim.

Id. at 1324-25.

By requiring district courts to appoint counsel for inmate civil rights plaintiffs in all cases which are not patently frivolous, the U.S. Court of Appeals for the Eighth Circuit has created a false market. Cases which have no real merit absorb the time and resources of the district courts, the appointed counsel, the defendants, and defense counsel. To stimulate this false market,

awards are issued in cases of marginal merit, and plaintiffs' attorneys' fees are enhanced.

It is time to return to a free enterprise market economy in the area of civil rights litigation. The incentive Congress provided to plaintiffs' counsel through 42 U.S.C. § 1988 should be more than adequate to supply legal representation for civil rights plaintiffs with meritorious cases.

CONCLUSION

The petitioners respectfully request that the Court issue its writ of *certiorari* to review the record in this case and to reinstate the decision of the district court.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-1085NEL

Shakur Abdullah, Appellant, v. Frank Gunter, Director of Corrections, et al, Appellees.	* Order Denying * Petition for * Rehearing and * Suggestion * for Rehearing * En Banc * * * *

The suggestion for rehearing en banc is denied. Judge Fagg, Judge Bowman, and Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

January 31, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gins
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-1085

Shakur Abdullah, Appellant, v. Frank Gunter, Director of Corrections; Gary E. Grammer, Associate Director of Corrections; Harold W. Clarke, Warden of NSP; John P. Shaw, Associate Warden of NSP; and Mark W. Rosenau, Chaplain of NSP, Appellees.	*	Appeal from the United States District Court for the District of Nebraska

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Submitted: February 14, 1991

Filed: November 26, 1991

Before McMILLIAN, ARNOLD and LOKEN, Circuit Judges.

McMILLIAN, Circuit Judge

Shakur Abdullah ("plaintiff") appeals from a final judgment entered in the United States District Court for the District of Nebraska dismissing his civil rights action under 42 U.S.C. § 1983. Plaintiff alleges violations of his constitutional rights under the due process, equal protection and free exercise clauses. For reversal, plaintiff argues the district court erred in (1) denying plaintiff's request for appointed counsel, (2) granting summary judgment in favor of defendants[1] on plaintiff's due process and equal protection claims, and (3) denying plaintiff's motion for new trial after a jury trial on his free exercise claim. In support of his motion for new trial, plaintiff argues that defendants were improperly represented by the Nebraska Office of the Attorney General, that the jury instructions were improper and that a new trial was warranted based upon newly discovered evidence. Plaintiff also argues that the evidence was insufficient to support the jury verdict for defendants. For the reasons discussed below, the district court's order is affirmed in part and reversed in part.

Background

On June 6, 1988, plaintiff, an inmate at the Nebraska State Penitentiary ("NSP"), requested that $2.00 be withdrawn from his account in the Inmate Trust Fund and

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[1] Defendants are Frank Gunter, Director of Corrections; Gary E. Grammer, Associate Director of Corrections; Harold W. Clarke, Warden of NSP; John P. Shaw, Associate Warden of NSP; and Mark W. Rosenau, Chaplain of NSP.

sent to the Masjid Muhammad of Lincoln, Nebraska. The request was denied under the direction of defendant Rosenau, the prison chaplain. Plaintiff filed subsequent grievances seeking to reverse the denial. Defendants, all of whom are officers or employees at NSP, consistently denied his request.

Plaintiff, a Muslim, maintains that his $2.00 contribution was to fulfill his holy obligation of Zakah. The practice of Zakah, a form of charity or tithing, is one of the five basic pillars of the Islamic faith. From 1978 until 1986, plaintiff observed the practice of Zakah by periodically contributing funds from his inmate trust account.

The Inmate Trust Fund allows NSP to account for inmate money and to maintain control over inmate deposits and disbursements. Guidelines for accounting and handling money in the Inmate Trust Fund were set forth in an Operational Memorandum No. 113.002.112 ("OM"). The OM had occasionally been amended by the NSP administration and, as of October 1985, it permitted inmates to withdraw funds "to assist with family support, make purchases at the Canteen and from approved vendors, or deposit funds in interest bearing accounts in approved financial institutions"; the term "family" was specifically defined as "parent, brother, sister, daughter, son, or spouse." The OM further stated that, "[a]ny exception to this stated list must have the approval of the Warden." Pursuant to the "exception" provision giving the Warden discretionary approval power, inmates were permitted to make religious and charitable contributions from their trust fund accounts.

In an earlier state court action brought by an NSP inmate challenging the constitutionality of the OM, the Nebraska Supreme Court affirmed a lower state court decision striking the "exception" provision as unconstitutionally vague and enjoining enforcement of only that portion of the OM. *Meis v. Grammer*, 226 Neb. 360, 411 N.W.2d 355 (Neb. 1987).

At the time of plaintiff's June 1988 request, NSP officials adhered to a policy of denying all requests for disbursements from inmate accounts to religious organizations.[2] Meanwhile, however, prison officials continued to permit inmates to send checks for family support, for purchases at the Canteen or from approved vendors, or to deposit funds in interest-bearing accounts in approved financial institutions.

Plaintiff[3] filed a § 1983 action against defendants alleging violations of his rights under the due process,

---

[2] In September 1987, the Department of Correctional Services ("DCS") attempted to overcome the vagueness of the "exception" language of the OM by issuing an administrative regulation permitting, among other things, disbursements from inmate accounts to "recognized religious organizations." Neb. Admin. R. & Regs. ("AR") 204.1 (rev. Sept. 1987). Defendant Clark, who had become the NSP Warden in 1987, nonetheless continued to disallow disbursements to any religious organizations. In December 1988, DCS unilaterally revoked the reference to "recognized religious organizations." AR 204.1 (rev. Dec. 1988).

[3] This action was originally brought by plaintiff and co-plaintiff Raqib Abdul Aziz. Aziz, however, dropped out in the early stages of the litigation and is not a party to this appeal.

equal protection and free exercise clauses of the Constitution, and requesting court-appointed counsel. Upon review of the pro se complaint, a United States magistrate judge recommended dismissal of the due process and equal protections claims, denial of plaintiff's request for appointed counsel, and further proceedings on the First Amendment free exercise claim. *Abdullah v. Gunter*, No. CV88-L-577 (D. Neb. Oct. 20, 1988) (Magistrate Judge's Report, Recommendation, and Order). Upon review of objections to the magistrate judge's report and recommendation, the district court denied plaintiff's request for appointment of counsel and gave plaintiff an opportunity to amend his equal protection claim. *Id.* (Nov. 15, 1988) (Order on Objection to Magistrate's Report, Recommendation, and Order).

The parties subsequently filed cross-motions for summary judgment. Plaintiff additionally filed a motion for a temporary restraining order and a preliminary injunction. By memorandum and order dated June 26, 1989, the district court denied plaintiff's motions for summary judgment and for preliminary injunctive relief; the court granted defendants' motion for summary judgment as to the due process and equal protection claims, but denied defendants' motion as to the First Amendment claim. *Id.* (June 26, 1989) (Memorandum on Objection to the Magistrate's Report and Recommendation and on the Parties' Motions for Summary Judgment; Order).

Trial on plaintiff's First Amendment claim began on November 28, 1989. Plaintiff proceeded pro se. The jury returned a verdict in favor of defendants on November 30, 1989. The district court entered final judgment for defendants on December 5, 1989. This appeal followed.

Discussion

Appointment of Counsel

Plaintiff first argues that the district court erred by denying his request for appointment of counsel. We hold that the district court should have appointed plaintiff counsel on the First Amendment claim, once the district court found it to be meritorious.

In *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003 (8th Cir. 1984) (*Nelson*), Chief Judge Lay set forth the standard by which the district courts are to determine the need for appointed counsel for indigent civil litigants:

> [T]he appointment of counsel should be given serious consideration by the district court if the plaintiff has not alleged a frivolous or malicious claim. If a frivolous claim has been alleged, the district court may dismiss the claim. However, once the court is satisfied that plaintiff has alleged a valid prima facie claim, then further inquiry should be made as to need. The court should satisfy itself that plaintiff has in good faith attempted to retain counsel and has been unsuccessful. The court should also determine whether the nature of the litigation is such that plaintiff as well as the court will benefit from the assistance of counsel.

Id. at 1005. On review, we will set aside the district court's decision to deny appointed counsel upon a finding of abuse of discretion. *Id.* at 1004.

Plaintiff's First Amendment claim was neither frivolous nor malicious. Under the standard set forth in *Nelson*, the district court was therefore obligated to make

a determination of plaintiff's need for court-appointed counsel and the benefit to plaintiff and the court from the assistance of counsel. *Id.* at 1005.

In determining whether an indigent litigant is in need of appointed counsel, a number of factors are relevant including: the factual complexity of the case, the ability of the indigent to investigate the facts, the existence of conflicting testimony, the ability of the indigent to present his claim and the complexity of the legal issues. *Johnson v. Williams*, 788 F.2d 1319, 1322-1323 (8th Cir. 1986).

The district court determined that plaintiff did not need appointed counsel because "the factual and legal problems do not appear to be sufficiently complicated to require appointment of counsel." *Abdullah v. Gunter*, No. CV88-L-577 (Nov. 15, 1988) (Order on Objection to Magistrate's Report, Recommendation and Order). We disagree with the district court's determination that plaintiff's First Amendment challenge to NSP's policy of restricting religious contributions does not raise factually and legally complex issues. We believe other factors call for appointment of counsel as well.

Plaintiff had the burden of proving at trial that the NSP policy prohibiting inmates from making religious donations was not reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (*Turner*). The following issues were relevant to plaintiff's claim: (1) whether the policy possesses a valid connection with the legitimate, neutral governmental interest used to justify it; (2) whether plaintiff has other avenues for exercising his right to exercise his religion,

including the practice of Zakah; (3) the impact on the inmate population, prison staff and prison resources of accommodating the right; and (4) the availability of feasible, ready alternatives. *Id.* at 89-91; *see also Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990) (*Iron Eyes*); *Blankenship v. Gunter*, 898 F.2d 625, 627 (8th Cir. 1990).

The district court denied defendants' summary judgment motion on the First Amendment claim specifically because the court found genuine issues of material fact as to "whether alternative means of exercising the [First Amendment] right remain open to the inmates; and whether there is an absence of ready alternatives." *Abdullah v. Gunter*, No. CV88-L-577, slip op. at 5 (June 26, 1989) (Memorandum on Objection to the Magistrate's Report and Recommendation and on the Parties' Motions for Summary Judgment) (citing *Turner*, 482 U.S. at 90).[4]

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[4] The district court based its finding of genuine issues of material fact upon statements in plaintiff's affidavits that (1) inmates are restricted by NSP from using funds in outside financial institutions for purposes other than those approved for disbursements from the Inmate Trust Fund, and (2) outside financial institutions approved for inmate accounts charge a $2.00 fee for withdrawals, and may take anywhere from one to three weeks to process a withdrawal. The district court also concluded that NSP's policy of allowing disbursements to family members did not provide an alternative means for inmates to make religious contributions because of restrictions placed on those disbursements. *Abdullah v. Gunter*, No. CV88-L-577, slip op. at 4-5 (June 26, 1989) (Memorandum on Objection to Magistrate's Report and Recommendation and on the Parties' Motions for Summary Judgment). By contrast, in *Blankenship v. Gunter*, 898 F.2d 625, 628 (8th Cir. 1990), affirming a summary judgment in favor of NSP officials who had followed the same policy prohibiting religious donations, the plaintiff had failed to dispute evidence that alternative means of making religious contributions were available to NSP inmates.

These issues, along with the others specified in *Turner*, were presented to the jury as part of the jury's overall determination of the reasonableness of the NSP policy at issue. We believe the case which plaintiff was required to make to the jury, under the law of *Turner* and its progeny, was both legally and factually complex.

Moreover, plaintiff, an indigent prisoner, lacked sufficient resources to investigate the relevant facts. Plaintiff and the court would have benefited greatly from having appointed counsel investigate, for example, the extent to which the prison policy actually controlled the flow of inmate funds and illegal activities, the impact of permitting Zakah on the prison system, and the existence or absence of ready alternatives to the regulation.

Finally, plaintiff's ability to present his claim in a fair manner is certainly questionable where the determination of key facts and the ultimate application of law to fact is left entirely to the jury.[5] Unlike a bench trial or a motion

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[5] The verdict form submitted to the jury presented two questions: the first on the ultimate question of the constitutionality of the NSP policy, and the second on damages, if any.

The constitutional issue, in its entirety, was set forth as follows:

> 1. On the issue of whether there was a violation of the plaintiff's constitutional right we, the jury, find:
>
> a. for the plaintiff, Shakur Abdullah.
>
> b. for the defendants.
>
> (Circle "a" or "b")

hearing, where the court can be relied upon to take extra precautions to avoid undue prejudice to the pro se litigant, a jury trial does not afford such protection. To the contrary, the absence of counsel will more likely have a prejudicial impact on the minds of jurors, to the disadvantage of the pro se litigant.

Upon careful consideration of all circumstances in this case, we hold that the district court abused its discretion in denying plaintiff appointed counsel at trial on the First Amendment free exercise claim. As discussed below, we agree with the district court's analysis of plaintiff's due process and equal protection claims. Because we hold these claims to have been without merit and in fact frivolous, we hold that the district court did not abuse its discretion by denying plaintiff appointed counsel on those claims.

Summary Judgment

Plaintiff additionally argues the district court erred in granting summary judgment in favor of defendants on plaintiff's due process and equal protection claims. We review a grant of summary judgment de novo. The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986).

Equal Protection

To state an equal protection claim, plaintiff must show at a minimum that the state has failed to treat similarly situated persons alike. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). The district court held that no equal protection violation occurred in view of undisputed evidence that all inmates under the auspices of the Department of Correctional Services were denied permission to make religious or charitable contributions from their inmate trust accounts. *Abdullah v. Gunter*, No. CV88-L-577, slip op. at 2 (June 26, 1989) (Memorandum on Objection to Magistrate's Report and Recommendation and on the Parties' Motions for Summary Judgment).[6] We agree with the district court's determination that defendants are entitled as a matter of law to judgment on plaintiff's equal protection claim.

Due Process

Plaintiff suggests two grounds on which the district court erred in granting summary judgment on his due process claim. First, citing *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985), plaintiff argues that notice and a hearing are required before a constitutional right is infringed, and that his First Amendment right to free exercise of religion was infringed in violation of his right to procedural due process.

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[6] At trial, the parties stipulated, solely for the purposes of this case, that "[t]he prison policy regarding charitable contributions was applied equally to all inmates."

While it is true that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country," it has long been recognized that "the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). Whether the First Amendment affords plaintiff the right to use funds in his inmate account to make direct religious or charitable donations remains at the heart of plaintiff's First Amendment free exercise claim, subject to the reasonableness test set forth in *Turner*. *See, e.g., Iron Eyes*, 907 F.2d at 812-813.

The more appropriate inquiry under a due process analysis is whether the State of Nebraska has created a liberty or property interest in prisoners' use of their inmate account funds for broader purposes than has been permitted by NSP officials by placing substantive limitations on official discretion in administering inmate accounts. *See, e.g., Olim v. Wakinekona*, 461 U.S. 238, 249 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (*Hewitt*). This is the subject of plaintiff's second due process argument.

Plaintiff argues that, at the time his June 1988 request was denied, the State of Nebraska had created a constitutionally protected property interest in the use of his inmate account for religious donations.[7] To support this

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[7] We believe the "interest" which plaintiff argues is constitutionally protected would more appropriately be characterized as a liberty interest rather than a property interest, but for purposes of this disposition the distinction is not relevant.

proposition, plaintiff cites *Hewitt*, in which the Supreme Court found that "the repeated use of explicitly mandatory language [in Pennsylvania prison statutes and regulations] in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest." *Hewitt*, 459 U.S. at 472.

In the present case, plaintiff relies upon Neb. Rev. Stat. § 83-183(3) (1987), and AR 204.1 (rev. Sept. 1987) for the proposition that the State of Nebraska had created a protected property interest on behalf of prisoners in their use of inmate account funds for religious donations at the time of his June 1988 request. Those provisions state in pertinent part:

> [W]age payments to a person committed to the department shall be set aside by the chief executive officer of the facility in a separate fund. The fund shall enable the offender to contribute to the support of his dependents, if any, to make necessary purchases from the commissary, and to set aside sums to be paid to him at the time of his release from the facility.

Neb. Rev. Stat. § 83-183(3) (1987).

> The Chief Executive Officer shall formulate regulations for the withdrawal of funds by an inmate. Inmates shall be permitted to make withdrawals for the purpose of sending funds to members of the inmate's family (parents, grandparents, siblings, spouse, child or grandchild) to courts and members of the bar, to *recognized religious organizations* to institutional Canteens or hobby offices for purchase of canteen goods, hobby goods and mail-order merchandise.

AR 204.1 (rev. Sept. 1987) (emphasis added).[8]

We agree with the district court's analysis of Neb. Rev. Stat. § 83-183 finding, among other things, that the statute does not create a right of inmates to use nonwage monies in the Inmate Trust Fund for religious donations, without restriction. *See Abdullah v. Gunter,* No. CV88-L-577, slip op. at 6 (June 26, 1989) (Memorandum on Objection to the Magistrate's Report and Recommendation and on the Parties' Motions for Summary Judgment).[9] The statute simply does not mention religious

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[8] The substance of AR 204.1 (rev. Sept. 1987) was summarily revoked in December 1988, by AR 204.1 (rev. Dec. 1988).

[9] The district court concluded:

> I find nothing in Neb. Rev. Stat. § 83-183 that secures or gives definition to the benefit the plaintiffs claim – a right to use nonwage monies from their inmate trust funds in a manner inconsistent with OM 113.2.112. Even if I read the statute to require an exclusive fund for wage payments, which I do not, that separation requirement still would have no bearing on whether plaintiffs were entitled to use their nonwage monies held in the inmate trust fund free from restriction. Moreover, I am persuaded by the defendants' argument that the inmates impliedly consent to restrictions being placed on the uses of nonwage money sent to them at the penitentiary since OM 113.2.112 informs the inmates of the restrictions.

Abdullah v. Gunter, No. CV88-L-577, slip op. at 6 (June 26, 1989) (Memorandum on Objection to the Magistrate's Report and Recommendation and on the Parties' Motions for Summary Judgment).

contributions by inmates and therefore cannot be said to create a constitutionally protected interest in such activity. We also agree with the district court's analysis of AR 204.1 (rev. Sept. 1987), in which the district court found the language referring to "recognized religious organizations" to be vague, and thus unenforceable. *See id.* at 6-7. Since there are no genuine issues of material fact, and we hold that plaintiff has no constitutionally protected liberty or property interest in the use of his Inmate Trust Fund account for religious donations, we agree with the district court that defendants are entitled to judgment as a matter of law on plaintiff's due process claim.

Conclusion

For the foregoing reasons, we reverse the district court's order dismissing plaintiff's First Amendment claim and remand for a new trial on that issue with instructions to the district court to appoint counsel for those proceedings. We therefore need not reach plaintiff's arguments regarding the sufficiency of the evidence, newly discovered evidence or the jury instructions. We affirm the district court's grant of summary judgment on plaintiff's equal protection and due process claims. We hold plaintiff's remaining arguments on appeal to be without merit and affirm the district court in all other respects.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SHAKUR ABDULLAH,	)	CV88-L-577
Plaintiff,	)	
	)	MEMORANDUM AND
vs.	)	ORDER ON
FRANK O. GUNTER, et al.,	)	PLAINTIFF'S MOTION
	)	FOR NEW TRIAL
Defendants.	)	
	)	(Filed Dec. 22, 1989)

As the ground for a new trial, the plaintiff has submitted affidavits of Shakur Abdullah, Malik Islam Muhammad, and Abdur Rahman. The first says that the information in the other two was first learned by Shakur Abdullah on December 2, 1989, after completion of the trial. The essence of the other two affidavits is that the affiants and others were able to mail checks for Zakah while inmates at the Omaha Correctional Center during late 1986 or during 1985 through 1988.

Such evidence can relate only to the claim of equal protection, a claim to which a motion for summary judgment was granted by me on June 26, 1989.

Although the evidence contained in the two affidavits was first learned by the plaintiff in December, five months after the ruling on the motion for summary judgment and two days after the jury verdict on issues tried to the jury, that is not sufficient to cause a new trial. A requirement is that the evidence be shown not to have been discoverable by due diligence. All the showing

develops is that the affiants were in the Omaha Correctional Center at prior times, but there is no evidence that the material in the affidavits was not available in time to present it on the equal protection claim if due diligence had been used.

IT IS ORDERED that the motion for a new trial, filing 73, is denied.

Dated December 22, 1989.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SHAKUR ABDULLAH, Plaintiff,	)	CV88-L-577
vs.	)	JUDGMENT
FRANK O. GUNTER, et al., Defendants.	)	(Filed Dec. 5, 1989)

The jury having found there was no violation of the plaintiff's constitutional right regarding freedom of religion and other claims having previously been granted by the court,

IT IS ORDERED that judgment is entered for the defendants on all claims.

Dated December 5, 1989.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SHAKUR ABDULLAH, et al.,	)	CV88-L-577
Plaintiffs,	)	
	)	ORDER ON
vs.	)	OBJECTION TO
	)	MAGISTRATE'S
FRANK GUNTER, et al.,	)	REPORT,
	)	RECOMMENDATION
Defendants.	)	AND ORDER
	)	(Filed Nov. 15, 1988)

The plaintiffs' objections are to the magistrate's denial of appointment of counsel and ruling out of the denial-of-equal-protection claim.

I agree with the magistrate that the factual and legal problems do not appear to be sufficiently complicated to require appointment of counsel.

As to the claim of equal protection I think the plaintiffs should have the opportunity to amend their complaint, as they have requested to do.

IT IS ORDERED that the objection to magistrate's report, recommendation and order, filing 4, is denied with respect to the appointment of counsel, and granted as to the plaintiffs' request to amend their complaint to allege a claim of denial of equal protection; they shall

have until December 22, 1988, in which to file and serve an amended complaint.

Dated November 14, 1988.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SHAKUR ABDULLAH, RAQIB ABDUL AZIZ, Plaintiffs, v. FRANK GUNTER (Director of Corrections), GARY E. GRAMMER, (Assoc. Dir. of Corrections), HAROLD W. CLARKE (Warden of NSP), JOHN P. SHAW (Associate Warden of NSP), MARK W. ROSENAU (Chaplain of NSP), Defendants.	CV88-L-577 REPORT, RECOMMENDATION, AND ORDER (Filed Oct. 20, 1988)

Plaintiffs, inmates at the Nebraska State Penitentiary, have filed a civil rights complaint pursuant to 42 U.S.C. §1983. Liberally construing the allegations of the complaint, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), I conclude that all of the defendants are required to answer plaintiffs' First Amendment claim and I shall direct the clerk to issue summons for service upon them. I further conclude that the due process and equal protection claims are without merit, and I shall recommend their dismissal.

Plaintiffs are members of the Muslim religion. They allege that they have been denied the right to practice one of the five basic principles or "pillars" of their religion. The pillar which they have allegedly been denied is that known as Zakah, which involves the payment of money

to charity. On June 6, 1988, both plaintiffs attempted to send Zakah checks out of the institution. The requests were denied by Donn Beaver, a unit manager, at the instruction of defendant Rosenau. Attempts to resolve the situation administratively through interview requests to defendant Shaw and grievances to defendants Clarke, Gunter, and Grammer were unsuccessful. Plaintiffs claim that the acts of the defendants violate the First Amendment and deny them due process and equal protection.

Plaintiffs' First Amendment claim is sufficient to require an answer. Prisoners are entitled to a reasonable opportunity for religious worship. *Hudson v. Palmer*, 468 U.S. 517, 523 (1984). The allegations of the complaint support a claim that the restrictions on their sending money outside of the prison infringes on their religious practices. Where prison regulations limit the exercise of First Amendment rights, they may be upheld only if they bear a reasonable relationship to a legitimate penological objective. *O'Lone v. Estate of Shabazz*, ___ U.S. ___, 55 U.S.L.W. 4792, 4793 (1987); *Turner v. Safley*, ___ U.S. ___, 55 U.S.L.W. 4719, 4723 (1987). The legitimate penological objective in refusing to permit plaintiffs to make religious contributions is not readily apparent. It appears that prison officials are concerned that an inmate's sending money out of the institution to anyone but members of his family might somehow permit the indirect transfer of cash between inmates. In any event, it is not the province of this court to justify prison policies; that burden falls on the defendants.[1] There are allegations that the defendants

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[1] This court will, of course, recognize legitimate security interests which are clearly apparent from the face of the complaint.

each participated in the acts which plaintiffs claim violated their First Amendment rights. No legitimate security interest supporting these restrictions is presented on the face of the complaint. All of the defendants must answer this claim.

The equal protection and due process claims are without merit. The basic tenet of the Equal Protection Clause is that state should treat those persons similarly situated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 438 (1985). Plaintiffs have not alleged that they are being treated differently from anyone else. Thus, no equal protection claim is stated.[2]

The due process claim fares no better. Plaintiffs assert that they have a protected interest in having the rules governing religious contributions posted under *Neb. Rev. Stat.* §83-4,112(2). That statute provides:

> Committed persons shall be informed of rules and policies concerning institutional behavior and discipline, inmate rights and developmental opportunities, work or education programs, and complaint procedures. Such rules and policies, or significant portions thereof, shall be posted at conspicuous places throughout the institution.

Id.

Plaintiffs are correct is asserting that this statute satisfies one of the requirements for creating an interest

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[2] Even if a claim were stated, the appropriate inquiry would be the same "reasonable relationship" test which will be employed regarding the First Amendment claim.

protected by due process: it does speak in mandatory terms. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979). The difficulty is that it does not satisfy the other requirement, in that it fails to place substantive limitations on the discretion of state officials. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). Instead, it merely mandates procedure. This is not enough; "process is not an end in itself." *Id.* at 250.

Apart from any state-created interest, the notion of due process inherently requires that persons be given notice of the rules to which they are subject. The function of such notice is to ensure that any deprivation of liberty which occurs due to a violation of those rules will accord with due process. Thus, as this court has stated, "prior notice of jail rules is indispensable to a subsequent enforcement of those rules by the imposition of sanctions or even denial of privileges." *Moore v. Janing*, 427 F.Supp. 567, 577 (D. Neb. 1976). *See also Meis v. Gunter*, CV86-L-775, slip op. at 4-5 (D. Neb. memorandum dated September 26, 1988). Here, however, the rule change of which plaintiffs complain did not result in their being disciplined. The only adverse result was their inability to send out Zakah donations. This result was not caused by the failure to post the changes in the rule; it would have obtained as surely even if those changes had been posted. The failure to post the changes resulted in no harm to plaintiffs. *See Meis*, slip op. at 5, (posting required only where breach of a rule would result in disciplinary action). The due process claim should be dismissed.

Plaintiffs have requested that the court appoint counsel for them. The Eighth Circuit Court of Appeals has held that counsel should be appointed, upon request, for

an indigent civil rights plaintiff if the plaintiff has met his burden of demonstrating that his complaint is not frivolous, depending upon the court's assessment of the need for counsel, including consideration of such factors as the factual complexity of the case, the ability of the plaintiff to investigate the facts, the existence of conflicting testimony, the plaintiff's ability to present his claims and the complexity of the legal issues. *In re Lane*, 801 F.2d 1040, 1043-44 (8th Cir. 1986); *Johnson v. Williams*, 788 F.2d 1319, 1322-23 (8th Cir. 1986). Applying these considerations, I shall deny plaintiffs' request for appointment of counsel in this matter.

IT IS ORDERED:

1. Plaintiffs' request for appointment of counsel is hereby denied.

2. The clerk shall issue summons for service upon the defendants.

3. The United States Marshal shall serve such summons without the payment of costs, in accordance with *Fed.R.Civ.P.* 4(c)(2)(C)(ii).

4. After an appearance has been filed by any defendant, the plaintiffs shall serve upon such defendant or, if the appearance has been entered by counsel, upon such counsel, a copy of every further pleading or other document submitted for consideration by the court. Plaintiffs shall include with each original document submitted to the clerk of the court for filing a "Certificate of Service" stating the date a true and correct copy of such document was mailed to such defendant or his attorney. Any pleading or document submitted to the clerk for filing which

does not bear a Certificate of Service will be returned, unfiled, to the plaintiffs and will not be considered by the court. Likewise, any other communication directed to the court will not be considered unless it bears either a Certificate of Service or other notation indicating a true and correct copy has been mailed or delivered to such defendant or his counsel.

5. The plaintiffs shall keep the court informed of their current addresses at all times during the pendency of this action, and shall promptly notify the office of the clerk and the defendants or their counsel of any changes in such addresses.

FURTHER, IT THEREFORE IS HEREBY RECOMMENDED, pursuant to 28 U.S.C. §636 (b)(1)(B), that the equal protection and due process claims be dismissed.

Plaintiffs are hereby notified that unless objection is made within eleven days after they are served with a copy of this recommendation, they may be held to have waived any right they may have to appeal the court's order adopting this recommendation.

Dated October 20, 1988.

BY THE COURT

/s/ David L. Prester
United States Magistrate

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GARY GRAHAM, Plaintiff, v. OTOE COUNTY, NEBRASKA and JAMES GRESS, Sheriff of Otoe County, Defendants.	)	CV89-L-234 MEMORANDUM AND ORDER (Filed Dec. 11, 1990)

The jury returned a verdict in the plaintiff's favor and against the defendant Otoe County on the plaintiff's claim of inadequate exercise. On the same claim the jury returned a verdict for the defendant Gress. On the plaintiff's second claim submitted to the jury, that of inadequate clothing, the jury found for the defendants Gress and Otoe County. The court granted the defendants' motion for a directed verdict as to the plaintiff's medical needs claim and his access to his attorney claim, at the conclusion of plaintiff's case in chief. The jury awarded plaintiff $150.00 in actual damages on his claim of inadequate exercise against the county.

Plaintiff's attorney has now filed an application for fees and expenses totaling $21,733.50, and expenses of $471.21. The defendant has opposed the application on the grounds of excessiveness.

The first task in determining an appropriate attorneys fee is to determine the number of hours reasonably

expended on the litigation multiplied by a reasonable hourly rate, i.e. determining the "lodestar". *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In this case the defendant contests the number of hours spent on the litigation generally, particularly with respect to certain allegedly excessive allocations of time. In addition, defendant contends that the plaintiff's attorney has documented his time in insufficient detail to justify counting all of the hours claimed. Further, in light of the fact that the plaintiff prevailed on only one of his four claims, the defendant argues that the number of hours should be reduced by 75 percent.

I agree with the defendant that there are certain items claimed for which it appears an excessive amount of time has been spent. On the other hand, I disagree that the fact that plaintiff prevailed on only one claim requires a proportionate reduction in the hours allocated; the trial would not have been substantially shortened, and there is nothing that has been pointed out to me that would have been eliminated, had the plaintiff dismissed his two claims that did not go to the jury prior to trial. In short, while it is obviously true that some time would have been saved by so doing, I cannot say that 75 percent of the time spent was wasted. The dispute would have had to have been heard in any event, and the parties would have been required to bear the expense of preparation. I do not fault plaintiff's counsel for failing to dismiss the two claims upon which a directed verdict was granted, for they did not require a great deal more preparation and expense. On the other hand, I must consider the extent of the plaintiff's success in the case, and determine a number of

hours which was "reasonably expended" on the litigation. In doing so I do consider that at least some time was spent on these two claims needlessly, and also the fact that plaintiff did not prevail on one of his two claims presented to the jury. Considering all of these factors, I conclude that the number of hours claimed to have been expended on the entirety of the litigation should be reduced by 40 percent to reflect the extent of plaintiff's success, the ambiguity in some of the documentation, and what appears to be slightly excessive hours spent in various actions claimed.

The defendant also contends that the hourly rate claimed by plaintiff's counsel, $120.00, is excessive. Defendant has presented materials indicating that most attorneys of plaintiff's counsel's experience level in Nebraska charge less than that per hour. I agree, but I also am aware that attorneys in the Lincoln and Omaha communities would be toward the upper end of the scale, rather than the lower end. Thus, taking the "average" for the entire state of Nebraska is not an appropriate measure. The same materials submitted by the defendant, the Nebraska State Bar Association Economics Survey, indicate that in cities the size of Lincoln, where plaintiff's counsel practices, the most commonly charged hourly rates are between $91.00 and $100.00 (22 percent), and between $101.00 to $125.00 (29 percent). The rate of $120.00 per hour charged customarily by plaintiff's counsel is at the upper end of the scale. I do not find it grossly excessive as claimed by the defendant, but I believe a more appropriate hourly rate for this litigation in federal court is $110.00 per hour, and I shall adopt that rate in calculating the fee.

The rate charged for time expended by senior law clerks, $30.00 per hour, is reasonable in this community, and I shall apply it. See, *Jenkins v. State of Missouri*, ___ U.S. ___, 110 S. Ct. 1651 (1990). The number of hours claimed, however, will be proportionately reduced in keeping with the discussion above, that is, by 40 percent.

I shall not make an item-by-item examination of the factors listed by the Court in *Johnson v. Georgia Highway Express Company*, 488 F.2d 714 (5th Cir. 1974), which were expressly approved by the Supreme Court in *Hensley*. Those factors are to a large extent included in the determination of the reasonable number of hours expended, and the rate claimed. I do, however, specifically examine whether the fee should be enhanced.

In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. ___, 97 L. Ed. 2d 585 (1987), the court considered whether the lodestar should be enhanced for "risk of non payment." Five of the justices agreed that some enhancement should be available, while four justices would provide an enhancement consistent with determination of risk, Justice O'Connor, in joining the plurality, stated that, "No enhancement for risk is appropriate unless the applicant can establish that without an adjustment for risk, the prevailing party 'would have faced substantial difficulty in finding counsel in the local or other relevant market.' " *Id.* 97 L.Ed. 2d at 603. The Eighth Circuit Court of Appeals adopted this approach in *Catlett v. Missouri Highway and Transportation Commission*, 828 F.2d 1260, 1271 (8th Cir. 1987, *cert. den.* ___ U.S. ___, 99 L. Ed. 2d 889 (1988). Counsel in this case was appointed by the court for the reason that plaintiff's own efforts to find counsel were unavailing. This court has had extreme

difficulty finding competent counsel willing to represent prisoners in civil rights cases, and it is appropriate to take this factor into consideration in order to bring the fee within the range that would attract competent counsel. I emphasize that in deciding to enhance the fee award, I in no way consider the "risk of loss." In fact, in this case there was a very good chance of success for the plaintiff on the one claim on which he did prevail, in light of this court's having entered a judgment for plaintiffs on a nearly identical claim, albeit in an unreported memorandum decision, prior to the trial of this case but after its filing. *Gonzales v. Moreno*, CV88-L-29, CV88-L-53, CV88-L-146 (unreported memorandum opinion filed November 1, 1989). Thus, while the state of the law in plaintiff's claim had not yet been established at the time of the filing of this case, the possibility of a successful claim was real, and even this was insufficient to attract competent private counsel to the case. I therefore enhance the fee award by 30 percent.

Regarding expenses, I do not find the $471.21 claimed to be excessive, and shall award it. The plaintiff will be directed to reimburse the Federal Practice Fund the $250.00 previously authorized by the court, if in fact it has been paid.

IT THEREFORE HEREBY IS ORDERED, plaintiff's counsel is hereby awarded attorneys fees and expenses as follows:

Attorney Hours

163.9 hours claimed, less 40%
=98.3 hours at $110.00 per hour

= $10,813.00

Law Clerk Hours

68.8 hours claimed, less 40%
=41.3 hours at $30.00 per hour

= $ 1,239.00

$12,052.00

enhanced by 30% = $15,667.60

Expenses 471.21

Judgment will be entered accordingly.

SO ORDERED.

Dated December 11, 1990

By the Court

/s/ David L. Prester
United States Magistrate